

# San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

May 26, 2016

Heron Bay HOA  
C/O Alan Berger  
Law Offices of Alan Berger  
95 South Market Street, Suite 545  
San Jose, CA 95113

SUBJECT: Enforcement Action - Failure to comply with BCDC Permit M1992.057,  
Heron Bay Homeowners Association  
(Enforcement File No. ER2014.015 and BCDC Permit M1992.057)

Dear Mr. Berger,

As you know, your client, Heron Bay Homeowner's Association ("HOA"), is in violation of BCDC Permit No. 1992.057.00 ("Permit"), which was issued on September 4, 1994. Special Condition II.F.3.c (Public Access Improvements) of the Permit requires on Bayfront Drive, "a minimum of an 8-foot-wide paved path, with a minimum total of 4 feet of shoulder" and Special Condition II.F.2 (Permanent Guarantee) of the Permit requires this area to be permanently guaranteed to the public within 60 days of issuance of the Permit; neither of these Permit requirements has been satisfied. Therefore, the HOA has two Permit violations.

After working with you over the past two years to try to amicably resolve these violations with no success, I am now writing to state that you have 35 days to resolve each of these violations without any standardized fines, which are explained in the attached *Appendix of Standardized Fines and Enforcement Options*.

## **Violation One: Public Access Improvements on Bayfront Drive**

You may resolve this violation in one of two ways as follows:

- A. Obtain authorization for the as-built public access on Bayfront Drive (the approximately 6-foot-wide sidewalk with no shoulder and an approximately 12-foot-wide adjacent landscaped corridor) and for new public benefits to offset the absence of the required public access discussed in more detail below<sup>1</sup>; or
- B. Reconstruct the design of Bayfront Drive to be consistent with a minimum 8-foot-wide paved path adjacent to a minimum 4-foot-wide shoulder, as required by the Permit and pursuant to staff-approved plans.

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<sup>1</sup> To obtain authorization, you must submit a complete fileable application to BCDC to amend the Permit.

The HOA's September 16, 2015 proposal to install multi-directional bicycle sharrows and 15 daytime public shore parking spaces along Bayfront Drive was found by staff to be an adequate benefit to offset the absence of required public access since the current 6-foot-wide sidewalk is not wide enough to accommodate both pedestrians and cyclists in a safe manner.

This violation will be resolved upon the date of issuance of a permit amendment to legalize the as-built sidewalk plus in lieu access or the date of completion of construction of the currently authorized public access. We believe the first option is the mutually beneficial of the two.

**Violation Two: Legal Instrument to Guarantee the Public Access**

You may resolve this violation by submitting and gaining staff approval of a legal instrument to guarantee the public access. Enclosed are the instructions for preparing and approvable legal instrument and the blank form for your use. You will need to retain a surveyor to prepare a metes and bounds description and map of the public access areas. Please note that if you choose to resolve the public access violation described above by retaining the as-built access, you will not be able to fulfill the requirement to permanently guarantee the public access until you have obtained the above-described permit amendment to legalize the as-built public access plus in-lieu access.

**Background for Both Violations.** On July 6, 1994, BCDC issued the Permit to Citation Homes, the developer of Heron Bay residential development. Although Citation Homes failed to formally assign the Permit to the HOA, in violation of Special Condition II.K (Permit Assignment) of the Permit, the rights and obligations of the Permit run with the land and, thus, the HOA is subject to the Permit.

On May 15, 2014, the HOA presented before the City of San Leandro Planning Commission, a proposal to construct new gates and fencing at the entrance to Heron Bay to address residents' safety concerns by controlling vehicle and pedestrian access into the residential development and, in turn, to Bayfront Drive and Roberts Landing Slough, both of which are public access areas required by the Permit and BCDC Permit No. 1989.014.04 issued to the City of San Leandro. This proposal was not consistent with either permit because it would have discouraged members of the public from being able to reach the required public access areas.

Upon learning of the gate proposal, on June 12, 2014, BCDC staff contacted Cynthia Yonning, Community Manager for the HOA, provided a copy of the Permit, and informed Ms. Yonning that the gate would be a violation of the Permit and of the Commission's law to make changes to the public access area without first obtaining written authorization from BCDC by amending the current Permit. BCDC staff also informed Ms. Yonning that the legal instrument to guarantee the public access had never been submitted to BCDC and must now be prepared, approved by staff and recorded. Staff established a voluntary period for submitting the draft instrument, by November 4, 2014, and for recording an executed guarantee by March 1, 2015.

Further, if either of the aforementioned dates were missed, staff stated it would commence an administrative penalty clock. Even though both dates were missed, staff did not commence an administrative penalty clock. At this time, staff was unaware that the public access improvements on Bayfront Drive were constructed inconsistent with the Permit.

On June 13, 2014, you responded on behalf of the HOA, and acknowledged the HOA's legal obligation as successor of the Permit and intent to provide a public access guarantee.

On June 19, 2014, the City of San Leandro Planning Commission denied the HOA's application to install the security gates. On July 3, 2014, the HOA appealed the decision to the City Council who, in turn, denied the appeal and upheld the decision of the Planning Commission on September 2, 2014.

On November 13, 2014, BCDC staff met with you and the HOA board members to discuss the HOA's security concerns and the Permit violations. During this meeting, staff proposed that the HOA resolve the public access improvements violation by requesting authorization for the as built site conditions on Bayfront Drive with the addition of bicycle sharrows and public shore parking.

On January 7, 2015, the HOA formally proposed to BCDC staff the following settlement package that was discussed on November 13, 2014: (1) retain the as-built sidewalk and landscaping on Bayfront Drive; (2) provide a Class 3 bike lane including sharrows on Bayfront Drive; (3) modify the entrance at Lewelling Circle – located on City property - to include a drive through entry kiosk; (4) provide Bay Trail access/way-finding signage per BCDC guidelines beyond that required by the Permit; and (5) provide 10 daytime only public shore parking spaces along Bayfront Drive. In response, while BCDC staff supported items 1, 2, 4 and 5, it expressed concerns that the kiosk, item 3, could have a privatizing affect on the public access required at the site and was skeptical of the proposal. BCDC staff also reminded the HOA that local discretionary approval is necessary in order to file a permit amendment request.

On July 17, 2015, BCDC staff wrote you a letter reiterating its concerns about the security proposal involving a kiosk instead of a gate that was submitted to the City of San Leandro Planning Commission on or about May 28, 2015, and provided possible alternatives that addressed residents' safety concerns without adversely affecting the existing required public access. The letter also reminded you that separate from the kiosk proposal, the legal instrument to guarantee the public access had not been submitted and the physical access amenities required by Special Condition II.F.3.c are still not in place; thus, the HOA is in violation of two Permit conditions. BCDC staff provided the HOA with 30 days to submit an application to amend the Permit to resolve these violations, otherwise an administrative penalty clock would commence.

On August 4, 2015, in an effort to work with the HOA, BCDC staff granted the HOA's request to extended the 30-day deadline by an additional 30 days.

On September 17, 2015, BCDC staff received the application to amend the Permit requesting authorization to: (1) install and maintain BCDC public access signage on Bayfront Drive; (2) install bicycle sharrows along the roadbed of Bayfront Drive; (3) build an entry kiosk within the Lewelling Circle "bulb planter area"; (4) install "welcome signage" on entry kiosk and the approach; (5) install benches and trash receptacles in the public access area beyond what the Permit already requires; and (6) install 15 daytime public shore parking spaces along Bayfront Drive.

On October 15, 2015, BCDC staff responded to the application, informing you that it was incomplete pending the submittal of additional items, including but not limited to proof of adequate property interest and local discretionary approval because the proposed location of the kiosk was located on property owned by the City of San Leandro and the Planning Commission had yet to approve the proposal.

On January 4, 2016, the City of San Leandro denied the HOA's kiosk proposal for public health, safety and general welfare concerns. Additionally, the City informed the HOA that it had agreed to resolve the City's violations to its own permit by providing six public shore parking spaces along the perimeter of Lewelling Circle and, therefore, was unable to vacate the public right-of-way median circle for private use by the HOA for the kiosk.

On May 2, 2016, BCDC issued Amendment No. Five to the City of San Leandro's Permit, BCDC Permit 1989.014.05, which resolved the City's permit compliance issues by providing six public shore parking spaces at Lewelling Circle. BCDC staff has learned from the City that the HOA has recently revised its local proposal by moving the proposed kiosk onto privately-owned property and providing public shore parking spaces on Bayfront Drive.

**Staff Recommendation to Resolve Violations Before Pursuing Kiosk.** This chronology makes it clear that the HOA will not be able to file as complete its pending application to install a kiosk in the City-owned Lewelling Circle because it cannot obtain local discretionary approval for this proposal. As such, the HOA must withdraw or modify this portion of the pending amendment request. However, the concerns we have raised about the kiosk's potential adverse impacts on the required public access remain even as its proposed location may change.

As such, we recommend that you submit the amendment you require to resolve your violations separately from and in advance of the amendment you desire to install a kiosk. If you elect to construct the currently required public access, you will need an extension of completion time and staff approved construction plans.

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C/O Alan Berger  
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Staff looks forward to assisting you in obtaining the necessary amendment to the Permit and resolving the enforcement matter. You can reach me by telephone by calling 415/352-3668 or by email at [maggie.weber@bcdca.gov](mailto:maggie.weber@bcdca.gov).

Sincerely,

A handwritten signature in cursive script that reads "Maggie Weber".

MAGGIE WEBER  
Enforcement Analyst

Enclosures – 1. Appendix of Standardized Fines and Enforcement Options; and  
2. Legal Instrument Form and Instructions

## **APPENDIX**

### **Standardized Fines and Enforcement Options**

#### **For Violation One: Public Access Improvements on Bayfront Drive.**

***Regulation 11386(e)(4) For the failure to obtain a Commission permit prior to undertaking any activity that can be authorized by an administrative permit.***

If either a fillable application is submitted between thirty-six (36) and sixty-five (65) days and a permit is obtained within one hundred and fifty-five (155) days after the date of the mailing of this letter, or if the violation is completely corrected between thirty-six (36) and sixty-five (65) days after the date of the mailing of this letter, you may resolve the penalty portion of Violation One by paying a standardized fine of \$2,000.

If either a fillable application is submitted between 66 and 95 days and a permit is obtained within one hundred and eighty-five (185) days after the date of the mailing of this letter, or the violation is completely corrected between sixty-six (66) and ninety-five (95) days after the date of mailing of this letter, you may resolve the penalty portion of Violation One by paying a standardized fine of \$5,000.

If a fillable application is submitted more than ninety-five (95) days after the date of the mailing of this letter or Violation One is completely corrected within the same time limits, you may resolve the penalty portion of Violation One by paying a standardized fine of \$5,000, plus \$100 per day, from the 96<sup>th</sup> day to the date a permit is obtained or Violation One is completely corrected.

#### **For Violation Two: Legal Instrument to Guarantee Public Access**

***Regulation 11386(e)(2) For the failure to submit any document other than an executed Commission Permit in the form, manner or time required by a Commission permit.***

If the permanent guarantee is submitted to and approved by staff between thirty-six (36) and sixty-five (65) days after the date of the mailing of this letter, you may resolve the penalty portion of Violation Two by paying a standardized fine of \$1,000.

If the permanent guarantee is submitted to and approved by staff between 66 and 95 after the date of mailing of this letter, you may resolve the penalty portion of Violation Two by paying a standardized fine of \$3,000.

If the permanent guarantee is submitted to and approved by staff more than ninety-five (95) days after the date of the mailing of this letter, you may resolve the penalty portion of the Violation Two by paying a standardized fine of \$3,000, plus \$100 per day, from the 96<sup>th</sup> day to the date the permanent guarantee is approved by staff.

### ***Regulation 11386 Standardized Fines***

**Enforcement Options.** Pursuant to section 11386 of the BCDC's administrative regulations, you may resolve the penalty portion of each of the alleged violations by paying the standardized fines described below or you have the option to seek resolution through a formal enforcement proceeding that would involve a public hearing. If any of your actions are determined to be knowing and intentional violations or violate a term of a cease and desist order, the law (sections 66641.5(c) and 66641 of the McAteer-Petris Act, respectively) provides that we may refer this matter to the Office of the Attorney General, which could subject you to significant court imposed penalties.

**Cease and Desist and Civil Penalty Order.** If you have not corrected either Violations One or Two within 125 days of the date of this letter, you may no longer have the option to settle this matter with standardized fines and we may, pursuant to sections 66638 and 66641.5(e) of the McAteer-Petris Act, commence a formal enforcement proceeding that could lead to the issuance of a cease and desist and civil penalty order with an administratively imposed civil penalty of between \$10 and \$2,000 per day up to a maximum of \$30,000 per alleged violation.

## Instructions for Completing Public Access, View Corridor, and Open Space Forms

Please read the following instructions carefully before you attempt to complete the forms. If you wish to submit instruments in a different format, you must provide all of the information outlined in the forms and in these instructions.

### Instructions

1. Read your permit's special conditions (paragraph II) to determine whether you must draft an agreement to permanently restrict real property for public access, open space, or view corridor uses. In tandem with reviewing the special conditions, see the permit exhibit, which depicts the area(s) required to be permanently restricted. This is usually Exhibit A of the permit, but not always.
2. Fill in all of the blank spaces on the form to create a draft agreement. Near the top of page two, specify all persons or entities that are identified as permittees in the permit and specify whether the parties own, lease, or have some other property right. In the middle of page two, insert the description of your project using the verbatim language from the permit's authorization section (paragraph I-A). If your permit has been amended, use language in the most recent amendment.
3. Attach to the agreement:
  - a. A legal description and corresponding map of the entire parcel or parcels of property on which the authorized project is located; label this EXHIBIT A;
  - b. An executed copy of the permit or most recently amended permit; label this EXHIBIT B;
  - c. A legal description and corresponding map of the area that will be restricted for public access, open space, or view corridor use; label this EXHIBIT C. It is often necessary to retain a surveyor to prepare this legal description and map. You must provide the surveyor with a copy of your permit, including the permit exhibit that depicts the areas that are required to be restricted.
4. If you hold property in more than one manner, you should modify the form to so indicate and add additional exhibits. For example, if you own some property, lease some property and have an easement over property, which together create the project site, please create sub-exhibits such as: EXHIBIT A.1 for property that you own, EXHIBIT A.2 for property that you lease, and EXHIBIT A.3 for property over which you have an easement.



5. If you wish to draft a single instrument for any combination of public access, open space, or view corridor restrictions that are required by your permit, you must:
  - a. Modify the text of the agreement to include a description of each area to be restricted;
  - b. Provide separate exhibits to depict the public access, open space, and view corridor areas and number each as a sub-exhibit as suggested in #4 above.
6. When drafting the description of property restrictions, use language that precisely reflects the permit's requirements. For example, if the permit allows landscaping in a view corridor but specifies that it must not be taller than three feet, the agreement must include this exact language.
7. All maps must include:
  - a. a title, north arrow, graphic scale, important features such as top of bank;
  - b. names of existing and proposed structures, bodies of water, streets and other landmarks necessary to depict the property being restricted;
  - c. a depiction of the metes and bounds survey; and
  - d. the boundary of the Commission's Bay jurisdiction, which is usually delineated on the permit's exhibit. In areas that are not tidal marsh, the Commission's Bay jurisdiction is the mean high tide line. In tidal marsh areas, the Bay jurisdiction extends to five feet above mean sea level.
8. Because most county recorders only accept documents in an 8.5 x 11 inch format, maps must be submitted in that format. For larger project sites, use consecutive sheets with clearly marked match lines and a cover sheet referencing the breakdown. All text and numbers on exhibits must be legible so that they will be acceptable to the recorder's office. You should remove extraneous lines and numbers.
9. Please submit a typed draft of the agreement and its three exhibits before you have it executed by the appropriate party/ies. This will allow the staff to review the document and to determine if you have completed it correctly before you go to the trouble of having it executed.
10. If necessary, staff will provide you with written comments regarding necessary changes for approval. Upon receipt, please make the changes and resubmit the draft for further staff review.
11. Upon receiving and reviewing an approvable draft, the staff will have it signed by BCDC's Executive Director and return it to you for signing and recordation.
12. Have the approved document executed by the appropriate party/ies. Make sure all signatures are properly dated and notarized. All parties named on the permit, and who own or control the property, must execute the instrument. For a partnership, one or more partners may execute the instrument as required by the partnership agreement. For a corporation, an appropriate corporate officer must execute the instrument. You should provide a signatory authority for any individual signing on behalf of an entity.

13. After the instrument has been approved and executed by all necessary parties, it must be recorded. If speed is important, the permittee may wish to record the instrument. If you request, the staff will record the instrument. The permit requires you to submit evidence of recordation to BCDC. Therefore, please do so.
14. If you have any questions about these instructions, the use of the model forms, or how to comply with your permit conditions regarding public access, open space, or view corridors, please feel free to contact the legal or enforcement staff.

Recorded at the request of:  
State of California  
San Francisco Bay Conservation  
and Development Commission

WHEN RECORDED, mail to:  
San Francisco Bay Conservation  
and Development Commission  
455 Golden Gate Avenue, Suite 10600  
San Francisco, California 94102-7019

STATE OF CALIFORNIA  
OFFICIAL BUSINESS  
Document entitled to free  
Recording pursuant to  
Government Code  
Sections 6103 and 27383

NO TAX DUE

\_\_\_\_\_  
THIS SPACE FOR RECORDER

\_\_\_\_\_  
**Notice of Conditions, Covenants,  
and Restrictions Affecting**

\_\_\_\_\_ County Assessor Parcel \_\_\_\_\_

1. An agreement imposing public access restrictions on the use of the affected parcels.

2. BCDC Permit No. \_\_\_\_\_ dated \_\_\_\_\_, as amended through Amendment No. \_\_\_\_\_, dated \_\_\_\_\_

**Agreement Imposing Public Access Restrictions  
on the Use of Real Property**

This agreement is made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between \_\_\_\_\_, hereinafter referred to as “the permittee(s),” and the San Francisco Bay Conservation and Development Commission, hereinafter referred to as “Commission.”

WHEREAS, the permittee(s) own(s) [**LEASE(S) OR HOLD(S) AN EASEMENT AFFECTING**] certain real property referred to as “the subject property” that is located in the City of \_\_\_\_\_, County of \_\_\_\_\_, State of California, and is more particularly described in Exhibit A, attached hereto and by incorporated by reference into this agreement; and

WHEREAS, pursuant to the McAteer-Petris Act (Cal. Govt. Code § 66600 et seq.), the permittee(s) sought in Application No. \_\_\_\_\_ a permit for the following: [**INSERT THE PROJECT DESCRIPTION FROM SECTION I-A OF THE PERMIT**]; and

WHEREAS, the Commission has issued Permit No. \_\_\_\_\_, a copy of which is attached as Exhibit B and incorporated by reference, hereinafter referred to as “the permit,” for this work and the uses subject to conditions that are imposed for the benefit of the public and surrounding landowners, and without agreement to which by the permittee(s) the Commission could not issue the permit; and

WHEREAS, Special Conditions \_\_\_\_\_ to the permit provide that the permittee(s) must dedicate or otherwise permanently restrict certain real property more specifically described in Exhibit C to this agreement, which is attached and incorporated by reference into this agreement, for public access purposes.

NOW, THEREFORE, in consideration of the issuance of the permit and Special Conditions to the permit by the Commission and of the benefit conferred thereby on the subject

property, the permittee(s), on behalf of the permittee(s) and the permittee's(s') heirs, successors and assigns, hereby covenant(s) and agree(s) with the Commission, its successors and assigns that the portion of property more particularly described in Exhibit C, which is attached and incorporated by reference, shall be held open to the public for public access purposes, including but not limited to walking, viewing, sitting, fishing, picnicking, and other related purposes.

FURTHER, the permittee(s) agree(s) on behalf of the permittee(s) and the permittee's(s') heirs, successors and assigns that this public access restriction shall be attached to and become a part of the deed of the property.

FURTHER, the permittee(s) acknowledge(s) that any violation of this public access condition and deed restriction shall constitute a violation of the McAteer-Petris Act and of Permit No. \_\_\_\_\_, and, in addition to any other remedies provided by law, will subject the permittee(s) or any other person violating this public access condition and deed restriction to remedies as provided by sections 66637-66642 of the McAteer-Petris Act.

IT IS FURTHER RECOGNIZED that pursuant to sections 10503(c) and (d) of the Commission's regulations and Standard Conditions \_\_\_\_\_ to this permit, this agreement and deed restriction is a covenant running with the land for as long as the terms and conditions of the permit remain in effect or for so long as any use or construction authorized by this permit exists, whichever is longer, and shall bind the permittee(s), and the permittee's(s') heirs, successors, and assigns. The permittee(s) further agree(s) that the permittee(s) shall insert the restriction herein described in any subsequent deed or other legal instrument that divests the permittee(s) of either the fee simple title to or possessory interest in the subject property or some portion thereof.



Executed on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_,  
at San Francisco, California.

\_\_\_\_\_  
Executive Director  
San Francisco Bay Conservation  
and Development Commission

State of \_\_\_\_\_ )  
County of \_\_\_\_\_ ) ss.

On \_\_\_\_\_ before me, \_\_\_\_\_, a  
Notary Public in and for said County and State, personally appeared

\_\_\_\_\_  
personally known to me (or proved to me on the basis of satisfactory evidence to be the  
person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to  
me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by  
his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which  
the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

\_\_\_\_\_  
SIGNATURE OF NOTARY

(SEAL)